U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

File: A08 315 083 - Chicago

Date:

AUG 13 1997

In re: ANTON TITTJUNG

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: William T. Regas, Esquire
123 South Northwest Highway
Park Ridge, Illinois 60068

ON BEHALF OF SERVICE: Betty-Ellen Shave
Senior Trial Attorney
Office of Special Investigations
Criminal Division
Department of Justice

CHARGE:

Order: Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)] - Excludable at entry under sections 2, 10, and 13 of the Displaced Persons Act of 1948

Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - In the United States in violation of law

Sec. 241(a)(4)(D), I&N Act [8 U.S.C. § 1251(a)(4)(D)] - Participated in Nazi persecution

APPLICATION: Termination of proceedings; remand

In a decision dated March 25, 1994, the Immigration Judge found the respondent deportable under sections 241(a)(1)(A), (B), and (4)(D) of the Immigration and Nationality Act, 8 U.S.C. §§ 1251(a)(1)(A), (B), (4)(D), and ineligible for any form of relief from deportation, including asylum under section 208 of the Act, 8 U.S.C. § 1158, and suspension of deportation under section 244(a) of the Act, 8 U.S.C. § 1254(a). On May 18, 1994, the Immigration Judge ordered the respondent deported from the United States to Croatia. The respondent appealed and requested oral argument. The request was granted, and oral argument was heard on January 24, 1995. The appeal will be dismissed.

I. PROCEDURAL HISTORY

The respondent is a 72-year-old ethnic German ("Volksdeutscher") and native of Croatia. He initially entered the United States on May 24, 1952, as an immigrant pursuant to the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, as amended by Pub. L. No. 81-555, 64 Stat. 219 (1950) ("DPA"). He subsequently reentered the United States on August 31, 1955, as a returning immigrant. On January 9, 1974, the respondent became a naturalized citizen of the United States.

A. Denaturalization

In 1989, the Government brought a denaturalization action against the respondent in the United States District Court for the Eastern District of Wisconsin, alleging that he had served as an armed guard with the Waffen-SS Totenkopf Sturmbann ("Death's Head Battalion") at a concentration camp and therefore had procured his citizenship illegally. At a 3-day trial that commenced on October 31, 1990, the Government presented, inter alia, an SS-prepared roster dated July 26, 1944, which listed the guards stationed at the Gross Raming subcamp of the Mauthausen concentration camp. The roster included, at entry 100, the respondent's name, his rank, his date of birth, and his parents' place of residence. The respondent declined to testify and did not offer any other evidence. On December 14, 1990, the district court entered an order revoking the respondent's citizenship and cancelling his certificate of naturalization. United States v. Tittjung, 753 F. Supp. 251 (E.D. Wisc. 1990), aff'd, 948 F.2d 1292 (7th Cir. 1991), cert. denied, 505 U.S. 1222 (1992).

In its decision, the district court found that the guard roster was authentic and clearly and convincingly established that the respondent was an armed concentration camp guard. Id. at 256. The district court observed that in Fedorenko v. United States, 449 U.S. 490 (1981), the Supreme Court held that all concentration camp guards were ineligible for visas as a matter of law for having "assisted in the type of persecution proscribed by the DPA." Id. at 257. The district court therefore concluded that, as an armed concentration camp guard, the respondent was ineligible for his visa under sections 2 and 13 of the DPA and, thus, procured his citizenship illegally. Id. at 254, 256-57.[1] Although the district court made reference to evidence indicating that the respondent joined the Waffen-SS voluntarily, id. at 252-53 n.2, it emphasized that its conclusion was "not affected by the voluntariness" of the respondent's service. Id. at 257. The district court also considered it unnecessary to address "the Government's additional claims based upon [the respondent's] alleged misrepresentations in procuring his visa and in obtaining naturalization." Id.

---

[1] Section 2(b) of the DPA provided: "'Displaced person' means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization." Annex I of the International Refugee Organization ("IRO") Constitution, in turn, excluded from the definition of "refugee or displaced person" any person who had "assisted the enemy in persecuting civil populations of countries, Members of the United Nations." Section 13 of the amended DPA specified that "[n]o visas shall be issued . . . to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin."

B. Charges of Deportability

An Order to Show Cause was issued on May 11, 1992, charging the respondent with deportability under section 241(a)(4)(D) of the Act, otherwise known as the "Holtzman Amendment," as an alien who assisted the Nazi government of Germany in the persecution of persons because of their race, religion, national origin, or political opinion during the period beginning on March 23, 1933, and ending on May 8, 1945. The respondent was also charged with deportability under section 241(a)(1)(A) of the Act, as an alien who was within a class of aliens excludable under the law existing at the time of his 1952 entry, namely: (1) sections 2 and 10 of the DPA, because as one who assisted the Nazis in persecuting civilians, he did not qualify as a "displaced person"; (2) section 10 of the DPA, because he made a willful misrepresentation for the purpose of gaining admission to the United States as an eligible displaced person; and (3) section 13 of the DPA, because he advocated or assisted in the persecution of any person because of race, religion, or national origin. Lastly, the respondent was charged with deportability under section 241(a)(1)(B) of the Act, as an alien who entered the United States in 1952 in violation of sections 2, 10, and 13 of the DPA, and then reentered in 1955 and remained in violation of section 212(a)(19) of the Act, 8 U.S.C. § 1182(a)(19), which excluded aliens for fraud or willful misrepresentation of a material fact, and section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20), which excluded any immigrant who was not in possession of a valid immigrant visa.

The respondent admitted the allegations regarding his nationality, the fact of his admission in 1952 pursuant to the DPA, and the revocation of his citizenship, but he denied the fraud-related allegations and denied each of the charges of deportability. Alternatively, he requested an opportunity to apply for suspension of deportation and asylum, though neither of these forms of relief is available to an alien who is deportable for having assisted in Nazi persecution.

The Government moved for summary judgment on two separate bases. First, the Government argued, in essence, that the doctrine of collateral estoppel should be applied to the denaturalization judgment to bar relitigation of the factual and legal issues pertaining to the respondent's wartime service as an armed concentration camp guard, which would establish that he assisted in Nazi persecution for purposes of both the DPA and section 241(a)(4)(D) of the Act.[2] Second, the Government argued that an independent review of the evidence included in the record of the denaturalization proceeding would demonstrate the respondent's deportability on all of the charges set forth in the Order to Show Cause, including those relating to his alleged immigration fraud. The respondent opposed the motion, arguing that the use of collateral estoppel would be unfair in his case because of new evidence and that the record of the denaturalization proceeding introduced by the Government was incomplete. He requested discovery and a "trial."

[2] The Government also indicated that the doctrine of collateral estoppel should be applied to bar relitigation of the facts regarding the respondent's nationality and immigration to the United States pursuant to the DPA, but as noted above, these facts are not in dispute.

C. The Immigration Judge's Decision

The Immigration Judge granted the Government's motion for summary judgment, but at first glance, it is not entirely clear whether he sustained all of the charges of deportability, or just those that the denaturalization judgment would support. In his decision, the Immigration Judge overruled the respondent's objections to the record of the denaturalization proceeding and admitted it into evidence. He subsequently indicated that his finding of deportability was based in part on that record.

Nevertheless, a closer examination of the decision reveals that the Immigration Judge limited his factual and legal conclusions regarding the respondent's deportability to those issues determined by the prior judgment. For instance, in his actual discussion of the respondent's deportability, the Immigration Judge only referred to evidence from the denaturalization proceeding when considering whether to apply the doctrine of collateral estoppel in light of the new evidence presented. Thus, implicit in the Immigration Judge's decision is a finding that, through the use of collateral estoppel, the Government established the respondent's wartime service as an armed concentration camp guard, which rendered him deportable under sections 241(a)(1)(A), (B), and (4)(D) of the Act as an alien who assisted in Nazi persecution for purposes of the DPA and the Act. We emphasize that the Immigration Judge made no independent findings regarding the respondent's alleged immigration fraud. We further emphasize that no such findings were necessary, because the respondent's ineligibility for his visa under the DPA as one who assisted in Nazi persecution, if properly established, would amply support the order of deportation in this case.

II. THE DOCTRINE OF COLLATERAL ESTOPPEL

The doctrine of collateral estoppel precludes a party from relitigating issues that were actually litigated and necessary to the outcome of a prior suit. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979); Matter of Fedorenko, 19 I&N Dec. 57, 61 (BIA 1984). The doctrine serves "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co., Inc. v. Shore, supra, at 326. Thus, it may be applied to preclude relitigation of both issues of law and issues of fact, provided those issues were conclusively determined in the prior suit. Schellong v. United States, 805 F.2d 655, 659 (7th Cir. 1986); Frye v. United Steelworkers of America, 767 F.2d 1216, 1220 (7th Cir. 1985); Matter of Fedorenko, supra, at 67. In deportation proceedings, the application of the doctrine is appropriate where the alien was a party to the prior proceeding; the alien was given a full and fair opportunity to litigate in the prior proceeding; and the use of collateral estoppel is not unfair. Schellong v. INS, supra, at 658-59; Matter of Fedorenko, supra, at 61, 63-64; see also Kairys v. INS, 981 F.2d 937 (7th Cir. 1992) (noting that the argument that collateral estoppel should never be applied in deportation proceedings has been rejected, and explaining that the provision of the Act making the statutory procedure for deportation the sole and exclusive procedure for determining deportability of an alien does not preclude factual findings in a denaturalization proceeding from having collateral estoppel effect in a subsequent deportation proceeding).

III. PRIMARY ISSUE ON APPEAL

The respondent raises various arguments on appeal, some of which are not necessarily consistent. For instance, the respondent appears to acknowledge that the doctrine of collateral estoppel could not be applied in this case to preclude relitigation of the factual issues underlying his alleged immigration fraud, as the district court declined to address this issue, but he also contends that a finding that he assisted in persecution was not necessary to the denaturalization judgment. Considering these two positions together, it is difficult to discern the basis upon which the respondent believes the district court found his visa under the DPA invalid. In addition, the respondent indicates on the one hand that he may be a victim of misidentification while maintaining on the other that his service as a concentration camp guard was not voluntary and did not involve active participation in persecution. With his appeal, the respondent has proffered additional evidence.

Having considered the arguments on appeal, though, as well as the relevant caselaw, we find that the primary issue before us is relatively simple and can be framed as follows: did the Immigration Judge properly apply the doctrine of collateral estoppel to bar relitigation of the issues pertaining to the respondent's wartime service as an armed concentration camp guard? If so, summary judgment in favor of the Government was appropriate, because there were "no genuine issues of triable fact." United States v. Schmidt, 923 F.2d 1253, 1257 (7th Cir. 1991); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Kairys v. INS, supra; see generally Frye v. United Steelworkers of America, supra (summary judgment granted because doctrine of collateral estoppel applied); cf. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (finding in a case that did not involve collateral estoppel that summary judgment was inappropriate where review was based solely on litigation affidavits rather than the whole record).

IV. THE USE OF COLLATERAL ESTOPPEL IS FAIR IN THIS CASE

The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has stated:

> Given the full and fair judicial hearing to which an alien is entitled in a denaturalization proceeding, there is no reason not to apply the doctrine of collateral estoppel in a subsequent deportation proceeding to bar the relitigation of facts actually litigated and necessarily determined in the denaturalization case.

Kairys v. INS, supra, at 939 (citations omitted); see also Parklane Hosiery Co., Inc. v. Shore, supra, at 332 (finding no unfairness in applying collateral estoppel where there would be no procedural opportunities available to the petitioners that were unavailable in the previous action). Moreover, "when all factors required for collateral estoppel are present, it is the party opposing preclusion who must demonstrate that applying collateral estoppel in a specific case would result in particularized unfairness." Frye v. United Steelworkers of America, supra, at 1221 (citation omitted).

In this case, the respondent insists that the use of collateral estoppel is unfair for two reasons. The first is that he did not testify or present evidence at his denaturalization trial. The respondent argues that under the circumstances, the decision of the United States Court of Appeals for the Ninth Circuit in Title v. INS, 322 F.2d 21 (9th Cir. 1963), is controlling. We disagree.

A. Title

In Title, the Immigration Judge found that the alien was collaterally estopped from relitigating the issues underlying his deportability as a member of the Communist Party of the United States. The Immigration Judge therefore refused to allow the alien an opportunity to present evidence on his own behalf during the deportation proceedings. The Ninth Circuit found that this application of the doctrine of collateral estoppel was unfair, because the alien, who did not testify or present evidence at his denaturalization trial, "may have proceeded differently" in light of a change in the law defining Communist Party membership. Id. at 24-25.

At the same time, however, the question of whether to give findings in a denaturalization proceeding collateral estoppel effect in a subsequent deportation proceeding is not generally discretionary, at least not in the Seventh Circuit. See Kairys v. INS, supra, at 940. In the instant case, the respondent does not dispute that he had a "full and fair opportunity" to litigate the issues in his denaturalization proceeding. Schellong v. INS, supra, at 658. Moreover, he identifies no change in the applicable law, and we are aware of none. Therefore, we do not believe that his refusal to testify at his trial is sufficient to defeat the purpose of collateral estoppel. See Parklane Hosiery Co., Inc. v. Shore, supra, at 326; see generally Kairys v. INS, supra, at 941 (rejecting a position that might encourage strategic maneuvering at a trial to make the future consequences of a judgment less costly for the losing party). We note in this respect that, while the respondent did not testify, the record reflects that, through counsel, he cross-examined witnesses and challenged the admissibility of evidence introduced by the Government, including the guard roster. In other words, this is not a case where the issues, including the factual issue of whether the respondent served as an armed concentration camp guard, were "determined by admissions and stipulations" rather than "actually litigated." Id. at 940. We also point out that, contrary to the respondent's assertions on appeal, he was not precluded from presenting evidence before the Immigration Judge, and in fact, he did present evidence to oppose the Government's motion for summary judgment.

B. The New Evidence

This evidence forms the basis of the respondent's second reason for arguing that the use of collateral estoppel is unfair in these proceedings. Following the close of the denaturalization proceeding, the Government received a statement, dated March 22, 1991, from a survivor of the Mauthausen concentration camp who, starting in August 1943, spent about 5 months at the Gross Raming subcamp. The statement was translated on November 14, 1991, and forwarded to the respondent on October 6, 1992. In his statement, the survivor relates that there were "Yugoslav SS" among the camp staff at Gross Raming, but indicated that he did not know their names. However, he described a person by the name of "Anton Tittjung" as a 35-year-old "civilian employee at one of the firms that hired prisoners," whereas according to the roster, the respondent before us was a 19-year-old guard in the Death's Head Battalion in July 1944. The

survivor also described Anton Tittjung as a well-built man of medium height with dark red hair and hazel eyes, which differs from the description of the respondent provided on his immigration forms. Lastly, we note that according to the survivor, Anton Tittjung was a "sadist and a brute" who "had an especially bad reputation among the prisoners."

New evidence can prevent a denaturalization judgment from having collateral estoppel effect in deportation proceedings, unless the record conclusively shows that the new evidence is immaterial. Id. at 941; see Applied Materials, Inc. v. Gemini Research Corp, 835 F.2d 279, 281 (Fed. Cir. 1987). The respondent relies on the case of Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), to argue that the survivor's statement is not only relevant, but requires that he be allowed to conduct discovery to determine whether the Government is in possession of any "additional exculpatory evidence" as to his identity. This argument is specious.

In addressing the argument, we note at the outset that "the Federal Rules of Civil Procedure are not applicable in deportation proceedings, and there is no requirement that a request for discovery be honored." Matter of Benitez, 19 I&N Dec. 173, 174 (BIA 1984); see Kulle v. INS, 825 F.2d 1188, 1194 (7th Cir. 1987); Matter of Khalifah, Interim Decision 3255, at 9 (BIA 1995); Matter of Magana, 17 I&N Dec. 111, 115 (BIA 1979). As for the survivor's statement, we find, as did the Immigration Judge, that it is at best irrelevant to these proceedings, and at worst inculpatory rather than exculpatory. The statement certainly provides no basis for concluding that it would be unjust to give the district court's denaturalization judgment collateral estoppel effect in this case, because it in no way detracts from the evidence establishing that, whatever else the respondent before us may have been, he was in the summer of 1944 an SS guard at Gross Raming, a sub-camp of the Mauthausen concentration camp.

We point out in this regard that Demjanjuk involved a different set of circumstances. Like the respondent, Mr. Demjanjuk was charged with being ineligible for his visa under the DPA because of service as a concentration camp guard, but that is essentially where the similarities between their cases end. Mr. Demjanjuk was not accused of being just any guard; he was accused of being the notorious Ukrainian guard known as "Ivan the Terrible," and for this reason, he was extradited to Israel to stand trial on capital charges. As the court noted, the denaturalization and deportation orders against Mr. Demjanjuk were based primarily on his "failure to disclose his alleged wartime activities as 'Ivan the Terrible' at Treblinka," and "[t]he extradition order was based solely upon the district court's finding that Demjanjuk was Ivan the Terrible." Demjanjuk v. Petrovsky, supra, at 340.

The evidence identifying Mr. Demjanjuk as Ivan the Terrible came entirely from non-contemporaneous statements by eyewitnesses from Treblinka. However, the Government had more reliable evidence indicating that there was another Ukrainian guard by the name of Ivan and that the other, Ivan Marchenko, may have been Ivan the Terrible of Treblinka. In fact, while there was documentary evidence placing Mr. Demjanjuk as a guard at least at one other camp, Trawniki, his name, unlike Mr. Marchenko's, did not appear on lists of guards at Treblinka furnished by the Soviet and Polish governments. Such information should have been disclosed pursuant to interrogatories Mr. Demjanjuk had filed during the denaturalization proceeding and Fed. R. Civ. P. 26(e). Id. at 340, 350-51. In addition, the Government attorneys had an "obligation to work for justice rather than for a result

that favors [their] preconceived ideas of what the outcome of legal proceedings should be." Id. at 350. Nevertheless, due in part to outside pressures, the attorneys acted with such "reckless disregard for the truth" that it amounted to "fraud on the court" by failing to produce the "exculpatory materials." Id. at 354.

The Government in this case, however, did not set out to prove that the respondent was "one of the most notorious perpetrators of Holocaust atrocities." Id. at 355. Rather, the Government was content to show that he was a member of the Death's Head Battalion serving at Mauthausen and its sub-camp Gross Raming. The evidence used to prove this was of the type that tended to disprove that Mr. Demjanjuk was even at Treblinka, namely, a list of guards. Incidentally, the list in the respondent's case was of greater reliability than those at issue in Mr. Demjanjuk's case in that, instead of being compiled by the Soviet government or the Polish government, it was an SS-prepared roster included in the report of United States Army Major Eugene Cohen's official investigation of war crimes committed at Mauthausen and its subcamps ("Cohen Report"). United States v. Tittjung, supra, at 253.

The survivor's statement does not cast doubt on the reliability of the roster, which accurately provides objective biographic information regarding the respondent's rank, date of birth, and hometown. Indeed, it presents quite the reverse of the situation in Demjanjuk, because instead of being exculpatory, it suggests that there was an "Anton Tittjung" closer in character to Ivan the Terrible than previously indicated. At the very least, it confirms that there were SS guards at Gross Raming from Yugoslavia. As the survivor indicated that he did not know the guards' names, though, the only reasonable explanation for his description of a person by the respondent's name is that either his memory was faulty and the civilian he knew decades earlier was not actually called "Anton Tittjung" or there were two people at the camp by that name. See generally Demjanjuk v. Petrovky, supra, at 345-46 (indicating that non-contemporaneous statements are less probative than statements made closer in time to the events in question); United States v. Kairys, 600 F. Supp. 1254, 1260 (N.D. Ill. 1984), aff'd, 782 F.2d 1374 (7th Cir. 1986) (finding contemporaneous documentary evidence more significant than recent witness identifications). We further note that, notwithstanding the respondent's claim that there exists a question as to his identity, he does not appear to deny the fact that he was a concentration camp guard.

We conclude that the denaturalization judgment was appropriately given collateral estoppel effect in these proceedings. To the extent that the respondent means to imply that the Government attorneys engaged in prosecutorial misconduct before the district court, as was the case in Demjanjuk, we note that we find no evidence whatsoever to support this charge.

V. ISSUES NECESSARY TO THE JUDGMENT

The respondent does not dispute that the district court found that he served as an armed concentration camp guard and therefore was ineligible for his visa under the DPA. Nevertheless, he contends that a finding that he assisted in persecution was not necessary to the denaturalization judgment. To support this position, the respondent cites Palciauskas v. INS, 939 F.2d 963 (11th Cir. 1991), in which the court found that the Immigration Judge and the Board erred in applying collateral estoppel to preclude relitigation of the facts underlying a finding of deportability under the Holtzman Amendment.

Palciauskas is plainly inapposite to this case. The alien in Palciauskas was denaturalized on the grounds of concealment of a material fact and willful misrepresentation. The case involved evidence indicating that the alien may have had a role in the persecution of Jews while serving as the Mayor of Kaunas, Lithuania, from June 1941 to May 1942, but the district court found it unnecessary to resolve the persecution issue, because the fact that the alien had misrepresented his occupation during the war was in and of itself sufficient to support a finding that he had procured his citizenship illegally.

In contrast, it is readily apparent that the district court in Tittjung found it unnecessary to resolve the misrepresentation issue, because the fact that the respondent had served as an armed concentration camp guard necessarily meant that he had assisted in persecution for purposes of the DPA. United States v. Tittjung, supra, at 257. As noted above, the district court observed that "the Supreme Court established in *Fedorenko* that all concentration camp guards were ineligible as a matter of law for visas because they had assisted in the type of persecution proscribed by the DPA." United States v. Tittjung, supra, at 256-57 (emphasis added). Thus, we find that the issues conclusively established by the denaturalization judgment are, broadly stated, as follows: (1) the respondent served as an armed concentration camp guard; (2) as an armed concentration camp guard, he assisted in persecution for purposes of the DPA; and (3) he therefore was ineligible for his immigrant visa.

VI. DEPORTABILITY

It follows from the foregoing that the Immigration Judge was correct in finding the respondent deportable under sections 241(a)(1)(A), (B), and (4)(D) of the Act. Specifically, with regard to the first two grounds, we note that the respondent was not eligible for his visa under the DPA at the time of his initial entry in 1952 and, consequently, was also not entitled to status as a returning immigrant when he reentered in 1955. These charges do not appear even to be seriously disputed on appeal. Instead, the respondent's arguments center on the Holtzman Amendment.

In Fedorenko v. United States, supra, at 512, the Supreme Court held that "an individual's service as a concentration camp armed guard - whether voluntary or involuntary - made him ineligible for a visa." The Court explained that the omission of the word "voluntary" from the definition of "displaced person" under the DPA "compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." Id. However, to address the concern of the district court below that this interpretation of the term "assisted" could exclude survivors who had been forced to assist the SS in the operation of the camps, the Court added a footnote further explaining that the focus should be on:

> whether particular conduct can be considered assisting in the *persecution* of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from

> the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems . . . .

Id. at n.34. Based on this footnote, the courts in three cases relied upon by the respondent held that a showing of some personal involvement in persecution was necessary to sustain a finding of assistance in persecution. See generally Petkeiwytsch v. INS, 945 F.2d 871 (6th Cir. 1991) (holding that an alien was not deportable under the Holtzman Amendment where he served involuntarily as a camp civilian guard and never personally abused prisoners); United States v. Sprogis, 763 F.2d 115 (2d Cir. 1985) (holding that passive accommodation of the Nazis by a Latvian police officer did not render him ineligible for a visa under DPA); Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985) (holding that under the Holtzman Amendment, the Government was required to prove that the alien had personally participated in the persecution of individuals and that willing membership in a movement was not sufficient).

Sprogis and Laipenieks both involved policemen and, thus, are easily distinguishable.[3] Indeed, the court in Sprogis expressly noted that the case fell "between the extremes of the death camp barber and the weapon wielding guard . . . ." United States v. Sprogis, supra, at 121. However, the respondent contends that the facts in Petkeiwytsch "squarely mirror" the facts in his case.

The most significant shortcoming in this argument is that the respondent's case falls within the jurisdiction of the Seventh Circuit, which has repeatedly held that an alien who served as an armed guard at a Nazi concentration camp has assisted in persecution for purposes of the Holtzman Amendment. In doing so, the court has specifically rejected the position that proof of personal involvement in atrocities is required. Kairys v. INS, supra, at 942-43; Kulle v. INS, supra, at 1192; Schellong v. INS, supra, at 661; see also United States v. Schmidt, supra, at 1258-59 ("Whether or not Schmidt personally engaged in acts of violence, however, does not affect our conclusion that he assisted in persecution. . . . Service as an armed guard . . . ensured the systematic destruction of concentration camp inmates."); United States v. Kairys, 782 F.2d at 1378 (explaining that although the Supreme Court noted that "Fedorenko had testified to shooting in the direction of escaping prisoners, this was distinguish Fedorenko's position as a camp guard from those concentration camp survivors who were forced to perform tasks within the camp") (citation omitted). The court in Schellong noted:

> The purposes of [the DPA and the Holtzman Amendment] were identical: to exclude from the United States individuals who along with the Nazis had inflicted suffering on persons because of their race, religion, or political opinion. . . . Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political, and religious oppression.

---

[3] We also emphasize that the decisions in United States v. Sprogis, supra, and Laipenieks v. INS, supra, are not controlling, because this case does not arise in either the Second Circuit or the Ninth Circuit.

Schellong v. INS, supra. In Kairys, the court further explained:

> If the operation of such a camp were treated as an ordinary criminal conspiracy, the armed guards, like the lookouts for a gang of robbers, would be deemed coconspirators, or if not, certainly aiders and abettors of the conspiracy; and no more should be required to satisfy the noncriminal provision of the Holtzman Amendment that makes assisting in persecution a ground for deportation.

Kairys v. INS, supra, at 943.

Like Kairys and Schellong, but unlike Petkeiwytsch, the respondent's case involves the doctrine of collateral estoppel. Thus, it has been conclusively established by the denaturalization judgment that the respondent served as an armed concentration camp guard. In addition, it has been conclusively established that the respondent assisted in persecution for purposes of the DPA. Therefore, the respondent has also assisted in persecution for purposes of the Holtzman Amendment.

We could end our discussion at this point, but in light of the consequences of finding the respondent deportable under section 241(a)(4)(D) of the Act, see Matter of Fedorenko, supra, we consider it worthwhile to address a second major flaw in his argument. Contrary to the respondent's assertion, Petkeiwytsch is also factually distinguable. Petkeiwytsch involved a civilian guard at a labor education camp who, following the war, was apprehended by the British as a suspected war criminal, but then released "under 'category 5,' which meant that he was totally exonerated of any wrongdoing and of all charges." Petkeiwytsch v. INS, supra, at 873. Therefore, it can be viewed as presenting "the difficult problem of where to draw the line." United States v. Sprogis, supra. In such cases, even the Seventh Circuit recognizes that "a showing of personal involvement in persecutions may be necessary." United States v. Kairys, supra.

The respondent's case, in contrast, presents no "line-drawing problems." Fedorenko v. United States, supra. The respondent did not serve at a labor education camp, "the least restrictive type of Nazi detention camp." Petkeiwytsch v. INS, supra, at 877. He served at the Mauthausen concentration camp and its subcamp Gross Raming. United States v. Tittjung, supra, at 253. The operation of the concentration camps, including Mauthausen and Gross Raming, was "entrusted exclusively" to the Death's Head Battalion of the Waffen SS. Id. at 254. As the court in Petkeiwytsch itself observed, the SS concentration camps were the "most repressive" of the Nazi camps. Petkeiwytsch v. INS, supra, at 873. At Mauthausen and Gross Raming, the prisoners included Jews, political opponents of the Nazis, and American prisoners of war. United States v. Tittjung, supra, at 254. "In all, thousands of prisoners died in Mauthausen as the result of shooting, gassing, hanging, electrocution, starvation, forced labor, lethal injection, and other forms of killing." Id. (citation omitted).

Moreover, the respondent was not a civilian and his duties can not be compared to cutting hair. He was in the Waffen SS and assigned to the Death's Head Battalion and, as such, he wore a skull and crossbones on the collar of his uniform. Id. at 253. His duties at Mauthausen and Gross Raming included "guarding prisoners to ensure that they performed forced labor and that they did not escape from the labor site; guarding prisoners on forced marches from the main

camp to subcamps; and guarding prisoners from the camp perimeter and its watchtowers to ensure that they did not escape." Id. (citations omitted). In addition, he was "under orders to shoot at any prisoner attempting to escape." Id. (citations omitted). During the period of his service, "the death toll at Mauthausen ranged from 200 to 300 per day in 1943, and from 350 to 400 per day in 1944," and of these deaths, at least 185 occurred at Gross Raming. Id. at 254 (citation omitted). Therefore, in this case, the requisite assistance in persecution may be "inferred from the circumstances." Kulle v. INS, supra, at 1193; see United States v. Schmidt, supra; see also United States v. Breyer, 41 F.3d 884, 890 (3d Cir. 1994) (assistance in persecution found where the defendant "was a trained, paid, uniformed armed Nazi guard who patrolled the perimeters of two [concentration] camps with orders to shoot those who tried to escape") (emphasis added); Kalejs v. INS, 10 F.3d 441, 444 (7th Cir. 1993) ("The Holtzman Amendment's non-criminal provision thus makes assistance in persecution an independent basis for deportation, and assistance may be inferred from the general nature of the person's role in the war."); see generally United States v. Stelmokas, 100 F.3d 302, 314 (3d Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 1847 (1997) (noting that "while there is no eye-witness testimony identifying [the defendant] as a person who committed atrocities or otherwise persecuted the civilian population, the only reasonable inference to be drawn from the record is that he did exactly that"); United States v. Koreh, 59 F.3d 431, 442 (3d Cir. 1995) ("There need be no personal participation by the defendant in the commission of physical atrocities.").

In sum, this is not a close case. We find that the respondent's deportability under sections 241(a)(1)(A), (B), and (4)(D) has been established by clear, unequivocal, and convincing evidence as required by Woodby v. INS, 385 U.S. 276 (1966), and 8 C.F.R. § 242.14. As an alien who assisted in the persecution of other persons on account of race, religion, nationality, membership in a particular social group, or political opinion, the respondent is not eligible for either asylum or withholding of deportation. See sections 101(a)(42)(B) and 243(h)(2)(A) of the Act, 8 U.S.C. §§ 1101(a)(42)(B), 1253(h)(2)(A); Matter of McMullen, 19 I&N Dec. 90 (BIA 1984). His deportability under section 241(a)(4)(D) of the Act also renders him ineligible for relief under section 244 of the Act. See Matter of Kulle, 19 I&N Dec. 318 (BIA 1985); Matter of Fedorenko, supra. As no other form of relief is available, the Immigration Judge's order of deportation to Croatia was correct.

VII. THE RESPONDENT'S MOTION TO REMAND

The respondent requests that this Board consider the additional evidence, including an affidavit, that he has presented with his appeal. As the Board is an appellate body, id. at 74, we construe his request as a motion to remand. Having examined the evidence, we note that much of the information in the respondent's affidavit was not only available at the time of the Immigration Judge's decision, it could have been testified to at the respondent's denaturalization trial. Moreover, we find that even if the evidence were considered to be "previously unavailable" in these proceedings by virtue of the Immigration Judge's summary judgment, the motion must be denied, because the evidence would not change the result in this case. See Matter of Coelho, 20 I&N Dec. 464 (BIA 1992).

On the contrary, in his affidavit, the respondent admits that he served as a camp guard and was armed with a rifle. He claims that he was conscripted by the Germans because of his German heritage, that he served under duress, and that he never personally inflicted any abuse

on any person, including the prisoners. However, as shown above, his service as an armed concentration camp guard, whether voluntary or involuntary, is itself sufficient to establish that he assisted in persecution. See Fedorenko v. United States, supra; United States v. Breyer, supra; United States v. Schmidt, supra; Matter of Fedorenko, supra.[4] In any event, the respondent's claims in this regard pertain to issues that he is collaterally estopped from challenging. The remainder of the evidence relates to the respondent's requests for asylum and suspension of deportation, for which he is not eligible.

Accordingly, the appeal will be dismissed, and the motion to remand will be denied.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

FOR THE BOARD

[4] We also point out that the respondent's self-serving statements regarding the voluntariness of his service are contradicted by evidence indicating that at the time the respondent joined the Waffen SS, "the SS had not yet reached an agreement with the government of Croatia on the conscription of ethnic Germans . . . ." United States v. Tittjung, supra, at 252-53 n.2.